

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1960

The Continental Bank and Trust Co. v. Charles Cunningham and Winford Bunce : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Fabian & Clendenin; Albert J. Colton; Kent Shearer; Attorneys for Respondent;

Recommended Citation

Brief of Respondent, *Continental Bank and Trust Co. v. Cunningham*, No. 9138 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3491

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

FEB 29 1960

THE CONTINENTAL BANK AND
TRUST COMPANY,

Plaintiff and Respondent,

vs.

CHARLES CUNNINGHAM and WIN-
FORD BUNCE,

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.
9138

UNIVERSITY OF UTAH

BRIEF OF RESPONDENT JUL 10 1967

LAW LIBRARY

FABIAN & CLENDENIN

Albert J. Colton

Kent Shearer

Attorneys for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	11
ARGUMENT	
POINT I: THE THEORY OF APPELLANTS IS AT VARIANCE WITH THEIR THEORY BELOW.	12
POINT II: THERE IS NO EVIDENCE OF A FRAUD- ULENT AND CORRUPT CONSPIRACY.	14
POINT III. APPELLANTS HAVE NO CLAIM UN- DER TITLE 57, CHAPTER 3, SECTION 8, UTAH CODE ANNOTATED 1953.....	19
POINT IV. SUMMARY JUDGMENT WAS PROPER- LY AWARDED.	22
CONCLUSION	28
APPENDIX A	30

AUTHORITIES CITED

TEXTS CITED

56 A.L.R. 332 (1927)	21
4 Am. Jur. Assignments, § 83	18
11 Am. Jur. Conspiracy, § 3-5, 45	14

	Page
3 Barron and Holtzoff, Federal Practice and Procedure, § 1231	23
1 Glenn on Mortgages, § 53	21
2 Jones on Mortgages (7 Ed.) § 991	20
6 Moore's Federal Practice	22, 23
Restatement of Contracts, § 158	18

CASES CITED

Abdulkadir v. Western Pacific R.R. Co., 7 Utah 2d 53, 318 P.2d 339 (1957)	25
Aetna Loan Company v. Fidelity and Deposit Company of Maryland, Utah, 346 P.2d 1078 (1959).....	24
Alvarado v. Tucker, 2 Utah 2d 16, 268 P.2d 986 (1954)....	28
Brown v. Yarborough, 130 Miss. 715, 94 So. 877 (1923)..	20
Burgert v. Union Pacific R.R. Co., 240 F.2d 207 (8 Cir., 1957)	24
Continental Bank v. Kowalsky, 247 Mich. 348, 225 N.W. 496 (1929)	21
Draper v. J. B. & R. E. Walker, Inc., 115 Utah 368, 204 P.2d 826 (1949)	21
Evans v. Shand, 74 Utah 451, 280 Pac. 239 (1929)	12
Fisher v. Bank of Spanish Fork, 93 Utah 514, 74 P.2d 659 (1937)	12
Fox v. J. Johnson and Wimsatt, 127 F.2d 729 (D.C. Cir., 1952)	22
Galloway v. Litchfield, 8 Min. 188 (1863)	20
Harding v. Home Inv. & Sav. Co., 49 Idaho 64, 286 Pac. 920 (1930)	21

	Page
Harris v. Swanson, 67 Ala. 486 (1880)	20
Holbrook v. Webster's, 7 Utah 2d 148, 320 P.2d 661 (1958)	24
Holland v. Columbia Iron Mining Co., 4 Utah 2d 303, 293 P.2d 700 (1956)	17, 26, 27
In Re Beason's Estate, 49 Utah 24,, 161 Pac. 678 (1916)..	12
Johnson v. Beickey, 64 Utah 43, 228 Pac. 189 (1924).....	17
Lewis v. Cannon, 22 Ala. App. 634, 118 So. 911 (1929)..	20
Mathiew v. Boston, 51 S.D. 619, 216 N.W. 361, 56 A.L.R. 332 (1927)	21
Matievich v. Hercules Powder Co., 3 Utah 2d 283, 292 P.2d 1044 (1955)	25
Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297 (1953)	24
Murphy v. Flemming, 69 Mich. 185, 36 N.W. 787 (1888)..	20
Nalder v. Kellogg Sales Co., 4 Utah 2d 117, 288 P.2d 456 (1955)	19
New York Life Ins. Co. v. Cooper, 167 F.2d 651 (10th Cir., 1948)	24
Rees v. Murray City Board of Education, 6 Utah 2d 196, 310 P.2d 387 (1957)	24
Shibata v. Bear River State Bank, 115 Utah 395, 205 P.2d 251 (1957)	20
Thatcher v. Merriam, 121 Utah 191, 240 P.2d 266 (1952)	17, 18
Twenty-Second Corp. et al. v. Oregon Short Line Railroad Co., 36 Utah 238, 103 Pac. 243 (1909)	12
Upton v. Heiselt, 118 Utah 573, 223 P.2d 428 (1950)	12
Wiener v. Automobile Finance Co., 347 Pa. 217, 31 A.2d 898 (1943)	21

STATUTES CITED

UTAH CODE ANNOTATED 1953:

44-1-37	17
57-3-6	19
57-3-7	19
57-3-8	12, 19
78-12-29	13

IN THE SUPREME COURT of the STATE OF UTAH

THE CONTINENTAL BANK AND
TRUST COMPANY,

Plaintiff and Respondent,

vs.

CHARLES CUNNINGHAM and WIN-
FORD BUNCE,

Defendants and Appellants.

Case No.
9138

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Inasmuch as appellants' "statement of facts" merely repeats portions of the pleadings, and such facts as are relied upon by appellants appear only as terse conclusions scattered throughout the argument, a restatement is necessary.

The pleadings showed disagreement as to plaintiffs' rights (R. 1-4, 7-13), but discovery procedures made it clear that

there was "no genuine issue as to any material fact."* In the following statement, the deposition of Robert M. Worsley, an employee of respondent (R. 63), will be identified by "W," and the deposition of appellant Bunce (R. 62), by "B". Inasmuch as appellant Cunningham deferred to Bunce's version of the facts (Cunningham deposition, pp. 46, 48), his testimony will not be referred to separately.

In 1954 appellants' title to the Prospector Lodge, a motel in Moab, was encumbered by a real estate mortgage (B. 3). On or about February 3, 1956, appellants executed and delivered to respondent Continental a promissory note, a copy of which was attached to amended complaint (R. 2, 7, para. 1; B. 1-2; W.3). The note was evidence of a loan from Continental to appellants for the purchase of storm doors for the lodge (B. 2-3; W. 18). On April 2, 1956, the real estate mortgage on the lodge was refinanced with First Security Bank of Utah (R. 8; B. 3).

On or about May 1, 1956, appellants sold the lodge, apparently reserving a right to repossess in event of default, to Mesa Development Company, of which C. P. Dickson was the principal officer (R. 3-4). Mesa, which was to make payments on the First Security mortgage, entered into possession (B. 4). In about November or December, 1956, Mesa defaulted on both the purchase contract and the mortgage (B. 5).

*Appellants served upon respondent an "Answer to Request for Admissions," admitting that Exhibits "A" through "D" were true and correct copies, and admitting Paragraph 5 of respondent's requests. The requests are at R. 37-52; though designated as part of the record by appellants (R. 58) the original answer apparently was not filed. A copy of this answer is set forth in Appendix A.

The last payment on appellants' Continental note, disallowing returned checks, was made December 17, 1956 (W. 10). Continental contacted Bunce numerous times thereafter regarding payment, Bunce always indicating that Dickson owed appellants money and promising Continental would be paid when that money was received (R. 27; W. 3).

On about April 30, 1957, First Security commenced an action to foreclose its mortgage (R. 49; B. 6). Meanwhile, Joe Santi and another were seeking to purchase Mesa's and appellants' interests in the property. They had deposited \$1,000.00 earnest money with Jones Realty in Moab, toward an expected purchase price of \$165,000.00. Bunce believed Dickson was "goofing the deal up" and appellants talked to Santi, trying to "resurrect the sale" so that they could "get get out with a whole hide." Bunce "probably" told Continental of the negotiations. The transaction with Santi fell through. Bunce quoted Santi as saying, "Hell, this thing is getting in foreclosure. Why should I worry about dealing with Dickson or you or anybody else? I will wait until the bank gets it and then I will buy it for nothing" (B. 6-11, 17).

On May 29, 1957, First Security entered a default in the foreclosure action, and on June 3, 1957, Mesa filed a "Claim to Property." On June 5, 1957, Mr. Bunce "might have" informed Continental that First Security had said it was going to foreclose on June 10, 1957 (B. 11). A short time prior to June 10 Worsley called Bunce and asked for payment on the Continental note. Bunce told him of the contract for sale of the motel, of First Security's first mortgage and commencement of the foreclosure suit, of Dickson's failure to make payment

on the Mesa contract, and of appellants' inability to pay Continental before Dickson paid them. Bunce did offer, on behalf of himself and Cunningham, to give Continental a second mortgage on the lodge for protection if the property were sold. Worsley accepted (R. 25-26; B. 11-12).

Worsley prepared the "mortgage" and on June 10 appellants executed it; it was recorded (R. 26, 35, 49, B. 11-12; W. 3). At that time, appellants told Worsley they expected Dickson to pay on the contract, in which case they could pay Continental (R. 26).

On or about June 13, 1957, appellants served a notice to quit upon (B. 8, 12), and on June 19 commenced suit against, Mesa (B. 12-13). On July 8 First Security bid in the property at foreclosure sale. Pursuant to a judgment of foreclosure, a sheriff's deed was executed, but perhaps not delivered, at that time (R. 49, B. 13).

Thereafter, still in July, 1957, Mesa appeared in appellants' action for possession. Following "legal maneuvering," including an order to show cause, appellants and Mesa entered into a stipulation (B. 13-14). Dated September 4, 1957, the stipulation is set out at R. 39-43 and an amendment at R. 44. The stipulation set up a new contract payment schedule and gave Mesa the opportunity to redeem from First Security by November 1, 1957, substituting another first mortgage for that of First Security. No express provision was made for subordination of Continental's mortgage (R. 39-44). It was contemplated that Mesa would obtain its financing from Hal Hancock, who would be the new first mortgagee (R. 14-15), that Continental would retain its position, and that appellants

would accupy a third position (B. 14-15). Pursuant to the stipulation, Mesa made a payment of \$10,500.00 in October, 1957, but did not redeem from First Security on November 1 (B. 18-19). Appellants did not hold Mesa to the stipulated deadline for redemption; on advice of their attorney, Mr. Snow, and the attorney for First Security, Mr. Ruggeri, they delayed repossession until December (R. 30; B. 19, 21-22). First Security's attorney was also acting as a scrivener for the Hancock interests (B. 22).

On about November 7, 1957, Snow telephoned Worsley, informing him that Dickson was arranging to borrow approximately \$45,000.00 from Hancock to redeem from First Security, but that Hancock would not lend enough to satisfy appellants' indebtedness to Continental. He asked Continental to subordinate its mortgage to Hancock's. Worsley indicated that Continental would do so if it received a renewal note providing for \$200 per month payments (R. 27; W. 7). It was Worsley's understanding that Mesa's October, 1957, payment to appellants had been employed to clear several judgments which were prior to Continental's lien (W. 7). As a result of the Snow-Worsley conversation, Ruggeri came to Salt Lake City prior to November 22, 1957 (R. 27; W. 8). At that time Worsley reiterated respondent's position (B. 15, 22; W. 8), and on November 22 wrote to Ruggeri as follows, with enclosures as indicated:

"In accordance with your request we enclose a release of second mortgage as well as a promissory note in the amount of \$2,285.28 repayable in twelve monthly installments of \$190.44 together with the new second mortgage.

“We understand our release of mortgage will be filed only if the Mesa Development Company is able to redeem this property by negotiation of a new first mortgage loan and that the new second mortgage will be executed by the Mesa Development Company and filed as a second mortgage together with the new note, signed by Mesa Development Company and endorsed by Charles Cunningham and Winford Bunce” (R. 27; W. 8).

Discouraged finally by Mesa’s inability to perform its agreement, appellants decided to close it out (B. 19-22), and did so by a Decree (R. 48) based upon Findings of Fact and Conclusions of Law (R. 45-47). Although the Findings and Conclusions and Decree are dated November 16, 1957 (R. 47-48), appellants and their counsel considered them to be effective as of either December 13 or 16, 1957, the date on which they were filed (B. 20-21).

After December 13 or 16, 1957, appellants understood that: “Mesa and Dickson were out of the picture legally” and “didn’t have any legal rights at all to the property”; that appellants “were not committed to anything,” for Dickson “was out if we wanted him to stay out of it,” because, although Bunce talked to Dickson “at least once after that, maybe more,” he considered that, if he “wanted to make another deal,” he was “free to do it” or “free to turn it down”; and that they were “free to negotiate with other people . . . just as freely as” they could with Mesa (B. 20-21). During later negotiations, appellants felt no legal obligation to Dickson or Mesa (B. 27).

January 8, 1958 was the last day for redemption from the

sale of the lodge to First Security (B. 18; W. 6-17). A few days before January 8, both Worsley and Bunce had had conversations with Dickson in which Dickson indicated he still wished to redeem the property if he could (W. 5-6, 13-14; R. 29-30). On the morning of January 8, Dickson called Worsley from Denver (W. 5, 13-14). "He said an agent of his by the name of Hal Hancock was at the Newhouse Hotel, that he would contact me [Worsley] a little later on with arrangements to pay off this account and get an assignment of the mortgage" (W. 5). [It later became apparent that Hancock was acting for himself rather than for Dickson (B. 42; W. 5); but at that time Worsley thought Hancock would redeem in Dickson's name (W. 6)].

Hancock did contact Worsley that day, proposing that Continental assign its interest to him so the lodge might be redeemed. He said he had a check for \$45,000.00 with which to effect the redemption (W. 6). Hancock indicated, however, that he wished to be obligated to pay the amount of appellants' indebtedness to respondent only if he could actually redeem from First Security (W. 28). Continental accepted Hancock's proposal (R. 49-50, W. 3-4), and a letter agreement was drawn by Mr. Adams, respondent's attorney (R. 27, W. 28). It is set out at R. 51 and appellants' brief, page 10. Pursuant thereto, Hancock delivered his note to Continental (W. 4, 9, 14) which delivered to Hancock appellants' mortgage to it (W. 4); a photostatic copy of appellants' note (W. 4, 30-31); and an assignment of Continental's interest in the note and mortgage (R. 52; W. 4, 27-28; App. Brf. 9). Appellants had actual notice of the assignment (B. 33).

On the afternoon of January 8, 1958, Ruggeri called Bunce, and stated that Dickson or his attorney, Woodbury, had asked for an extra day in which to redeem the property as they could not get to Moab on the 8th (R. 30). On January 9, 1958, Woodbury, either Hancock (R. 11; B. 24) or Dickson (R. 30), and two others (B. 24) went to Ruggeri's office. Glen Carlson, a representative of the Moab Branch of First Security, was there (R. 26) (B. 24). Ruggeri and Carlson refused to allow redemption on the basis of the Continental mortgage inasmuch as those seeking to redeem had not made provision for the protection of appellants (R. 30; B. 24). The would-be redemptioners threatened and contemplated a law suit based upon such refusal (R. 11; B. 31; W. 24).

Presumably in the hope that First Security would allow Cunningham and him to regain their interest in the lodge despite expiration of the redemption period, between January 8 and 31 Bunce sought financing (R. 30-31; B. 26). After some failures (R. 30-31), on or about January 25 appellants entered into a verbal agreement with Carlson (in his individual capacity) and Cecil Thompson under which Carlson and Thompson would put up money to redeem from First Security, and credit to pay Continental. The property was to be taken over by Carlson and Thompson if Cunningham and Bunce were unable to sell or refinance the property within 90 days (R. 31; B. 26-27).

On January 31, 1958, Bunce and Snow upon talking to First Security's Salt Lake attorney, were told that they and only they might redeem, but that First Security was "threatened with this hundred thousand dollar lawsuit with this guy

Hancock and Dickson here, whoever all is in it, but if you will pay Continental bank or get those boys out of the picture some way, we will take your money and let you have it" (B. 29). This was confirmed by the President of First Security—but with a caveat that the matter would have to be cleared up in 60 or 90 days (B. 30). It is not clear from the record whether Bunce believed that only Continental's mortgage had to be cleared or whether the Hancock-Dickson suit also had to be suppressed (R. 32; R. 30-31).

Following the conference with Quinney (First Security's counsel) and Eccles (its president), Bunce and Snow met with Worsley and Adams (R. 27-28; B. 30, 39-41; W. 8-9, 16-22), Bunce telling Worsley he had come to pay off the mortgage (R. 27). At that time, Bunce had neither a cashier's check nor a certified check; he did not have the money in his account, but only the Thompson-Carlson agreement to cover the check (R. 39). Worsley told Bunce that Hancock had not returned the assignment of the note and mortgage but that since Hancock's note was overdue he would call Woodbury and demand either payment or the mortgage (R. 28-29; B. 29). Bunce told Worsley that appellants had the money to release from First Security but that they were first required to pay off Continental and see that Hancock and Dickson were out of the picture (R. 28). Worsley or Adams called Woodbury and asked that the note and mortgage be reassigned or that Mr. Hancock's note be paid (R. 28; B. 41; W. 9, 17). Woodbury said that he would have to call Denver (Hancock's residence) about it (W. 18), and Worsley asked Bunce and Snow to return later (R. 28; B. 41). When they returned, Worsley called Woodbury, who refused to reassign (R. 28; B. 41), and

Worsley arranged for Bunce and Snow to confer with Woodbury (B. 41).¹

Bunce and Snow called on Woodbury, who said he would not give up the assignment, because he was planning to sue First Security (R. 29; B. 29-31). Although Woodbury said he would call appellants later, he did not (B. 31).

Appellants never again contacted Continental, Woodbury, Hancock, Dickson or First Security (R. 18-19, 22-23, 26-31, 35). Continental, however, continued its efforts to acquire the assignment and mortgage from Hancock or his attorneys (W. 15). It was to be returned in July, 1958, but was not because of illness in Woodbury's family (W. 11). On August 25, 1958, respondent sent a suit letter to Hancock (W. 17), and on September 2, 1958, Hancock returned the requested papers, and Continental returned his note and agreement to him (W. 15).

On December 23, 1958, respondent commenced action upon appellants' note (R. 1).

On March 16, 1959, appellants served respondent with an answer and counterclaim alleging a conspiracy between Continental and Hancock (R. 7-13). The essential averments of the counterclaim were denied by Continental (R. 14-16).

On August 19, 1959, respondent's motion for summary

¹Out of the foregoing conference, arises the only dispute of fact which respondent can discern from the record. Worsley recalls that Bunce did not have the money to pay his indebtedness (W. 21). Bunce denies imparting any information to that effect (B. 40-41). For purpose of this appeal, respondent assumes Bunce is correct.

judgment was heard, and on August 20, 1959, a judgment was entered dismissing appellants' counterclaim with prejudice.

Respondent specifically objects to the following recitation of fact by respondent:

(a) That the counterclaim alleged a conspiracy between respondent and Hancock "to deprive defendants of their equity in the mortgaged premises" (App. Brf. 2). The counterclaim in fact alleged that the conspiracy was to "redeem the said motel property in the name of Hal Hancock, without paying the sum due the defendants under the agreement made with said Mesa Development Corporation by the said C. P. Dickson" (R. 10-11) and "to cheat and defraud the defendants" (R. 12).

(b) That at the hearing on respondent's motion for summary judgment the defense "stated that the counterclaim contained the facts which constituted defendants' claim" (App. Brf. 3). The only recitation of statements of counsel at the hearing is contained in the judgment, to-wit: "that the record set forth the undisputed facts as to the basis of defendants' counter-claim" (R. 53). Appellants made no motion to alter or amend such recitation.

STATEMENT OF POINTS

I. THE THEORY OF APPELLANTS IS AT VARIANCE WITH THEIR THEORY BELOW.

II. THERE IS NO EVIDENCE OF A FRAUDULENT AND CORRUPT CONSPIRACY.

III. APPELLANTS HAVE NO CLAIM UNDER TITLE 57, CHAPTER 3, SECTION 8, UTAH CODE ANNOTATED 1953.

IV. SUMMARY JUDGMENT WAS PROPERLY AWARDED.

ARGUMENT

I

THE THEORY OF APPELLANTS IS AT VARIANCE WITH THEIR THEORY BELOW.

Appellants' counterclaim espoused the theory that they had been damaged by reason of a "fraudulent and corrupt" conspiracy between Continental and Hal Hancock. All the proceedings below were tuned to that theory, but now appellants assert an entirely different theory: tender of payment and violation by respondent of the penal, double-damages, slander of title provision, 57-3-8, Utah Code Annotated, 1953, raised by appellants for the first time on appeal (App. Brf. 5-7). The conspiracy theory lies mouldering.

A new theory may not be raised upon appeal, *Twenty-Second Corp. Etc. v. Oregon Short Line Railroad Co.*, 36 Utah 238, 103 Pac. 243 (1909); *In re Beason's Estate*, 49 Utah 24, 161 Pac. 678 (1916); *Evans v. Shand*, 74 Utah 451, 280 Pac. 239 (1929); *Fisher v. Bank of Spanish Fork*, 93 Utah 514, 74 P.2d 659 (1937); *Upton v. Heiselt*, 118 Utah 573, 223 P.2d 428 (1950). In the *Evans* case, this Court stated at 240 Pac.:

"The rule is well settled that on an appeal the parties are restricted to the theory on which the case was

prosecuted or defended in the court below. That is especially true as to the theory accorded a pleading in the court below which on appeal must be adhered to and cannot be shifted. * * * Whatever liberality may be accorded procedure, there nevertheless are certain fundamental principles which cannot be disregarded. These, among others, are that pleadings are the judicial means to invest the court with subject-matter jurisdiction and to limit issues and to narrow proofs; that courts cannot make a complaint for one thing stand for a different thing; that recovery must be *secundum allegata et probata*, which is but a necessary deduction from the maxim that what is not judicially presented cannot be judicially decided; that the statement of the cause of action or ground of defense as laid binds the court as well as the parties; and that there must be no departure is but another statement of the maxim that it is vain to prove what is not alleged. These principles are primary. (Citations deleted.)

Appellants based their case upon the theory of conspiracy; they have no standing to urge upon this court a completely different theory now.

One mischief of appellants' maneuver is that it requires expansion of respondent's brief to demonstrate that, on the basis of the uncontroverted facts of record, 57-3-8 is not applicable. If premeditated, it would appear to have been designed to avoid an affirmative defense by respondent based upon the one-year statute of limitation applicable to a statute for a penalty, 78-12-29 Utah Code Annotated 1953, in that the alleged tender and refusal took place on January 31, 1958, and defendants' counterclaim was not served or filed until March 16, 1959 (R. 13).

II

THERE IS NO EVIDENCE OF A FRAUDULENT AND CORRUPT CONSPIRACY.

Appellants alleged a fraudulent and corrupt conspiracy. By definition, civil or criminal conspiracy requires a combination of two or more persons seeking to accomplish by concerted action some criminal or unlawful act, or to accomplish by criminal or unlawful means some act not in itself unlawful. The elements of civil conspiracy are: (1) a combination of two or more persons (one may plan or plot alone, but he cannot conspire alone); (2) an actual combination, agreement or confederation with a common design; (3) the existence of an unlawful purpose or act to be accomplished or done, or a lawful purpose to be accomplished by unlawful means; (4) wrongful intent; (5) damage. 11 *Am. Jur., Conspiracy* §§ 3-5, 45. Bunce's testimony points out the facts in which appellants suspect a conspiracy:

"Q. In other words, other than the execution—and I am just trying to find out what your story is here, Mr. Bunce—other than the execution of this assignment and the execution of the side agreement dated January 8, 1958, do you have any other facts upon which you base your allegation that Continental entered into a fraudulent and corrupt conspiracy?

"A. Not that I know of.

"Q. Pardon?

"A. I guess that is about all. They took that note and that is all I know about it.

'Q. In other words, whatever fraudulent and corrupt conspiracy there was would be represented by these

two documents? You don't know of any other facts other than those, do you?

"A. No.

"Q. Why do you feel that the execution of these documents was a fraudulent and corrupt conspiracy?

"A. Well, I think if it has been executed right, I think the bank would have got their money in the first place. And in the second place, I think if the bank had been right, they would have took our money when we came up here and delivered our mortgage back, as long as it was past due. Their contract with this other party was past due and I think the bank should have taken our money.

* * *

"Q. You have got a number of things recited in here. I wonder if any of them you contend Continental had anything to do with?

"A. All I contend is that Continental supposedly sold him an assignment on a mortgage. As far as Continental, I would hate to think that a bank or anybody would go far enough that they would go in with a guy like Hancock or Dickson to throw—conspire a crooked deal; I wouldn't quite say that much. But it looks kind of bad, but I wouldn't quite go that far." (B. 38-39, 42).

Cunningham said he had no facts other than those given by Bunce to support their claim of a fraudulent and corrupt conspiracy.

Those are the bare bones of the lawsuit, and in this case the skeleton is the whole animal. If appellants cannot make out a conspiracy from the documents of assignment and the agreement between Hancock and Continental, the appeal must fail.

The conduct of Continental as shown by these documents and the surrounding facts is completely consistent with sound and honest business practice. When it became apparent that appellants weren't meeting their schedule of payments on the unsecured loan, Continental sought some security. Appellants offered a mortgage on property already the subject of a mortgage foreclosure action burdened by a contract of sale. Although of dubious value, the mortgage was a "bird in the hand," however small a bird. On the final day for redemption Continental, which had decided (who would not say, "wisely") not to spend \$35,000 more to save \$2,000, was approached by a stranger (Hancock) who wished to acquire Continental's interest. Even if Hancock had been the agent of Dickson (which apparently he was not), appellants had obtained a decree eliminating Dickson's interest in the property, so there was no right-duty relationship between Dickson and appellants with respect to the property. Hancock's obligation was contingent upon other facts, it's true, but as Continental's security would turn into a pumpkin at midnight, there was nothing to lose by accepting Hancock's proposal.

In exchange for an assignment to him of the appellant's note and mortgage, Hancock gave Continental his note for the same amount, to be paid if he succeeded in redeeming the property; if he failed he could reassign the documents and get his note back. Certainly Hancock's note was good consideration for Continental's assignment.

Appellants suggest that there was something sinister about the transaction because appellants' note was retained by Continental. But the assignment expressly included both the note

and mortgage and it is well established that a note may be assigned by a separate instrument even where the note itself is not delivered.

This court in *Thatcher v. Merriam*, 121 Utah 191, 240 P.2d 266 (1952), quoted with approval the following language:

“Like an ordinary chose in action, a bill or note may be transferred by assignment or by mere delivery with the usual incidence of such a transfer, and this rule is not changed by the negotiable instrument law. * * * It may be formal or informal; * * * it may be by separate instrument, or in the absence of a statute to the contrary, by parole * * * .

“While it has been held where there is a note, bond, or other written obligation evidencing the debt, that there must be a delivery of the instrument, it is generally held that delivery is not necessary if the assignment is proved by other satisfactory evidence. Thus, where an assignment of a chose in action is made by a separate paper it will be valid, although the written evidence of the chose in action is not delivered.” (*Supra*, p. 270).

As the above case pointed out, appellants' citation of 44-1-37 UCA 1953 is inapplicable, as it deals with negotiation of a note (i.e., the formalities necessary to make the transferee a holder in due course) and does not deal with transfer of the chose which the note represents. See also *Johnson v. Beickey*, 64 Utah 43, 228 Pac. 189 (1924).

The transaction with Hancock is hardly evidence of conspiracy. As stated in *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P.2d 700 (1956).

"Inferences are made for the purpose of aiding reason, not to override it. Inferences are nothing more than the probable or rational explanations of facts. Common sense and reason dictate that evil influences should not be permitted to be drawn from routine business transactions where there are no other circumstances. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into." (*Supra*, P. 702).

Respondent is puzzled by the appellants' assertion that "there was no redemption of the property prior to January 20, 1958, and hence no obligation to pay Continental and therefore consideration to support the assignment was totally lacking." (App. Brf. p. 12). Appellants cite no authority for this amazing logic. Moreover, "the defense that an assignment was made without consideration is not one * * * which ordinarily may be raised by the debtor in an action by the assignee; in other words, in an action against the original debtor or obligor, the assignee may generally recover, even though there was no consideration for the transfer." 4 *Am. Jur. Assignments*, § 83. See also *Restatement of Contracts*, § 158, and *Thatcher v. Merriam, supra*, at 240 P.2d 270.

The documents show that Hancock's obligation under the agreement was either to pay off his note to Continental for \$2,133.47, or to reassign the note and mortgage. The first alternative was only effective if Hancock was successful in redeeming the property. He was not successful. Therefore he chose the second alternative. Since he assumed a legal burden which prevented him from redeeming without paying the note to Continental, there was adequate consideration for the assignment.

The undisputed facts are that when appellants purportedly made their tender to Continental on January 31, 1958, the assignment was still outstanding. As it is apparent from the face of the document that there is no condition subsequent by which the assignment became null and void after January 20, Continental could not release what it did not own — whether or not payment was tendered.

The issue is as simple as that. Characterizing a perfectly legal transaction as a “false and fraudulent conspiracy” without a scintilla of supporting evidence or even one case citation dealing with the question of conspiracy may possibly be understood as the hysterical reaction of disappointed entrepreneurs, but is hardly proper as an allegation in a court of law.

III

APPELLANTS HAVE NO CLAIM UNDER TITLE 57, CHAPTER 3, SECTION 8, UTAH CODE ANNOTATED 1953.

Appellants’ theory relative to 57-3-8 UCA 1953, raised for the first time on appeal, is as unfounded as the “fraudulent and corrupt conspiracy” they pleaded.

In the first place, it is manifest that (taken in the context of Chapter 3 of Title 57, “Recording Conveyances” and noting that it immediately follows 57-3-6, “Discharge by certificate” and 57-3-7, “Discharge of liens by marginal entry”), 57-3-8 refers only to those damages which result from the slander of mortgagor’s title by virtue of a satisfied mortgage remaining of record. In this regard, see 1 *Glenn on Mortgages*, § 50.1 at page 321; *Nalder v. Kellogg Sales Co.*, 4 Utah 2d 117, 288

P.2d 456 (1955). Appellants allege no such damage. It is clear that First Security, which had actual notice both of Continental's mortgage and of assignment to Hancock, was far from concerned with the fact that the Continental mortgage was of record. It wanted out from under the threat of suit by Hancock.

Second, the mortgage was under assignment to Hancock at the time of the purported tender. Although such assignment was unrecorded, appellants had actual notice of it (B. 37). Under such circumstances, tender to the assignor does not result in the assignor's liability. It has been so held in cases decided under statutes like ours, *Harris v. Swanson*, 67 Ala. 486 (1880); *Lewis v. Cannon*, 22 Ala. App. 634, 118 So. 911 (1929); *Murphy v. Flemming*, 69 Mich. 185, 36 N.W. 787 (1888); *Brown v. Yarborough*, 130 Miss. 715, 94 So. 877 (1923); *Galloway v. Lichfield*, 8 Minn. 188 (1863).

Third, even if the court held that the assignment to Mr. Hancock were ineffectual, the facts support—and do not in any measure, by inference or otherwise, contradict—the good faith of Continental, acting under advice of its attorney, in believing the assignment to be in force on January 31, 1958. This court has had occasion to hold that a mortgagee, acting in good faith and under advice of counsel, is not liable under 57-3-8 for failure to discharge a mortgage, *Shibata v. Bear River State Bank*, 115 Utah 395, 205 P.2d 251 (1957). As stated at 2 *Jones on Mortgages* (7 Ed.) § 991:

“The mortgagee is not bound, upon tender of payment, to determine doubtful questions at his peril, and he is not generally held liable to the statutory penalty if his refusal is made in good faith and in the honest belief that he is not bound to accept tender.”

In support of the foregoing are *Harding v. Home Inv. & Sav. Co.*, 49 Idaho 64, 286 Pac. 920 (1930) reh. den., 49 Idaho 64, 297 Pac. 1101 (1930); *Continental Bank v. Kowalsky*, 247 Mich. 348, 225 N.W. 496 (1929); *Wiener v. Automobile Finance Co.*, 347 Pa. 217, 31 A.2d 898 (1943); *Mathiew v. Boston*, 51 S.D. 619, 216 N.W. 361, 56 A.L.R. 332 (1927).

Fourth, there is no evidence that appellants, after January 31, 1958, kept their tender good. This is a requirement for recovery under the statute, 1 *Glenn on Mortgages*, § 53.

Fifth, if Continental's assignment to Hancock was ineffective, its right of redemption expired as of January 8, 1958. Thus, on January 31, 1958, the relationship between appellants and Continental was simply that of debtors and creditor. Continental's mortgage was subject to the First Security action and had been foreclosed.¹ It is well settled that 57-3-8, being penal and strictly construed², applies only to the mortgagor-mortgagee relationship, *Draper v. J. B. & R. E. Walker, Inc.*, 115 Utah 368, 204 P.2d 826 (1949). As of January 31, 1958, Continental had neither mortgage nor (if appellants are correct) right of redemption.

Therefore, on at least five grounds, the new-found theory of appellants is inapplicable.

¹78-37-3, UCA 1953.

²*Shibata v. Bear River State Bank*, *supra*.

³See footnotes 2-6, 6 *Moore*, Par. 56.04(1) pp. 2029-30.

IV

SUMMARY JUDGMENT WAS PROPERLY AWARDED.

The main thrust of appellants' argument is that there are material issues between them and respondent which preclude the rendition of summary judgment. (App. Br. p 4-5). It should be borne in mind that respondent's motion was based *inter alia* upon the affidavit of Mr. Worsley and exhibits attached to it and that appellants took no steps at all to controvert any of the allegations in the affidavit. Appellants' discussion appears to be founded upon two untenable premises: (1) that summary judgment must be denied if there is any genuine issue of law even if there is no genuine issue of material fact; (2) that the allegations of their pleading cannot, on motion for summary judgment, be pierced by depositions, admissions and affidavits on file.

As to the first premise, Rule 56 does not contemplate that, if the ascertainment of material facts upon which there is no substantial controversy is practicable, the motion should be denied due to the existence of issues of law. According to 6 *Moore's Federal Practice*, par. 56.16 at pp. 2166-67, even

"The existence of an important, difficult, or complicated question of law, where there is no genuine issue of material fact, is not a bar to summary judgment. Resolution of the legal issues is for the court, and will not be rendered easier by going through the futile motions of a trial where there is no issue of fact to be tried." (Footnotes deleted.)

In *Fox v. Johnson and Wimsatt*, 127 F.2d 729 (D.C. Cir., 1952), the court stated at 127 F.2d 737:

“Conflict concerning the ultimate and decisive conclusions to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile.”

That the second premise of appellants is also unsound is clear from a reading of Rule 56(c) which provides for the use of depositions, admissions and affidavits. In addition, Rule 12(c) provides for a judgment of the pleadings; if pleadings are to control. Rule 56 is surplusage. 3 *Barron and Holtzoff, Federal Practice and Procedure*, § 1231 at pp. 97-99, indicates:

“The summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact . . . It is intended to promote the expeditious disposition of cases, and avoid unnecessary trials where no genuine issues of fact are raised. *The procedure enables a party to pierce the allegations of fact in the pleadings and obtain relief by showing that there are no issues of fact to be tried.*” (Footnotes eliminated; emphasis supplied.)

6 *Moore*, par. 56.04 (1) at pp. 2029-30 is in accord:

“(T)he rule permits a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of material fact to be tried. . . . Even though an issue may be formally raised by the pleadings, summary judgment may be granted if there is no genuine issue of material fact. The court is authorized to examine proffered materials extraneous to the pleadings, not for the purpose of trying the case, but

to determine whether there is a genuine issue of material fact to be tried. If there is no such genuine issue, the parties are not entitled to a trial and the court, applying the law to the undisputed material facts, may render a summary judgment.” (Footnotes eliminated.)

Again, at Volume 6, paragraph 55.11(2), page 2065, Professor Moore notes: “(T)he real purpose of summary judgment procedure is to afford a method for piercing factual allegations of pleadings, rather than to obtain a judgment solely on the basis of the pleadings * * * .” Federal cases overwhelmingly support the text writers. In *New York Life Ins. Co. v. Cooper*, 167 F.2d 651 (10 Cir., 1948), the rule was expressed succinctly:

“A motion for summary judgment should pierce the formal allegations of an answer and should be sustained, unless the existence of a genuine issue of fact be shown.”

An identical approach is adopted toward pleadings seeking affirmative relief, *Burgert v. Union Pacific R. R. Co.*, 240 F.2d 207 (8 Cir., 1957).

Utah has not developed a peculiar set of summary judgment rules at variance with federal practice. In a number of cases, this court has affirmed summary judgments although, obviously, questions of law existed and the bare pleadings reflected factual disagreement, *Morris v. Farnsworth Motel*, 123 Utah 289, 259 P.2d 297 (1953); *Rees v. Murray City Board of Education*, 6 Utah 2d 196, 310 P.2d 387 (1957); *Holbrook v. Webster's*, 7 Utah 2d 148, 320 P.2d 661 (1958). Recently, this court, on interlocutory appeal, reversed an order denying summary judgment, on the basis that facts about which there was no genuine dispute entitled the movant to summary

judgment as a matter of law, *Aetna Loan Company v. Fidelity and Deposit Company of Maryland*, Utah, 346 P.2d 1078 (1959).

Summary judgments have been affirmed where, although the plaintiff's complaint stated a claim upon which relief could be granted, facts elicited through discovery procedure have demonstrated that liability did not, as a matter of law, attach, *Matievich v. Hercules Powder Co.*, 3 Utah 2d 283, 292 P.2d 1044 (1955); *Abdulkadir v. Western Pacific R.R. Co.*, 7 Utah 2d 53, 318 P.2d 339 (1957). In *Abdulkadir*, the court stated:

"Extensive pretrial discovery was employed by counsel for both parties, including the taking of depositions. The trial court granted defendant's motion for a summary judgment, from which plaintiff appeals.

"The first attack plaintiff makes upon the summary judgment is that the procedure is too hasty. He says that if the case had been allowed to come to trial in its regular turn on the calendar, he might have been able to produce another witness or witnesses. This contention is without merit. The accident happened over a year before the motion for summary judgment was entered. There was no reasonable assurance that the witness referred to, a resident of California, might be found within a reasonable time or at all, nor that his testimony would help plaintiff if available. Speaking generally, it is to be assumed that when a plaintiff files his action he has sufficient evidence to demonstrate a right to recovery. All he is entitled to is a reasonable opportunity to marshal and present such evidence."

The appellant also contended that there were material issues of fact in dispute and that he was entitled to a trial by jury. This court responded:

“We are in accord with the idea that the right of trial by jury should be scrupulously safeguarded. This, of course, does not go so far as to require the submission to a jury of issues of fact merely because they are disputed. If they would not establish a basis upon which plaintiff could recover, no matter how they were resolved, it would be useless to consume time, effort and expense in trying them, the saving of which is the very purpose of summary judgment procedure. The pertinent inquiry is whether under any view of the facts the plaintiff could recover. It is acknowledged that in the face of a motion for dismissal on summary judgment, the plaintiff is entitled to have the trial court, and this court on review, consider all of the evidence which plaintiff is able to present, and every inference and intendment fairly arising therefrom in the light most favorable to him.” (Footnotes deleted.)

Of particular pertinence to the instant case is this court's decision in *Holland v. Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P.2d 700 (1956). The six causes of action set forth in the complaint alleged that the corporate defendant, through its president, Mr. Walter Mathesius, had conspired with an individual defendant, Arthur E. Moreton, Esq., to defraud plaintiff's predecessors in connection with the purchase of their interest in certain mining claims. Mr. Moreton owned a one-fourth interest in such claims. He also acted as attorney for his cotenants. Mr. Moreton received \$287,500 for his interest. His cotenants, who were not informed of the amount received by Mr. Moreton, were paid \$100,000.

The trial court sustained Columbia's motion for summary judgment on the basis of a record composed of pleadings, depositions and affidavits. On appeal, this court characterized the issue as follows:

“(W)hether any genuine issue of material fact exists . . . If there be no such issue, then the judgment must be affirmed. Otherwise, the action must be reversed . . . ”

The trial court was affirmed inasmuch as the objective facts were without dispute (293 P.2d 700-702, 703-704) except those not material (293 P.2d 701-702). In order to prevail, therefore, appellant was obliged to argue that, from the undisputed facts, a jury might properly *infer* the existence of a conspiracy. The majority opinion noted at 293 P.2d 702:

“(W)e do not feel that appellants can be permitted to draw favorable inferences from these facts. Inferences are made for the purpose of aiding reason, not to override it. Inferences are nothing more than the probable or natural explanations of facts. Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business transactions where there are no other circumstances. To hold otherwise would throw the door open for an attack on each and every transaction that one might enter into.” (Citations deleted).

The concurring opinion, at 293 P.2d 704-705, noted:

“Plaintiffs argue that if in viewing the foregoing facts in the light most favorable to them there exists even ‘a slight doubt’ as to whether Mathesius participated in furthering a fraud, the summary judgment must be reversed. This somewhat overstates the case for the plaintiffs. It is true, indeed, that a summary judgment is a drastic remedy which the courts are, and should be reluctant to use. Yet it does have a salutary purpose in the administration of justice in not requiring the time, trouble and expense of trial, when the best showing the plaintiff can possibly claim would not entitle him to a judgment.

"Viewing the evidence in the light most favorable to the plaintiff does not mean that the court should pick out all of the aspects thereof favorable to supporting plaintiff's claim and ignore those that indicate to the contrary. It means that the court surveys the whole picture, takes into consideration facts and inferences therefrom tending to favor the plaintiff's position, and also considers other facts appearing which must be accepted as a matter of law, and weighs the whole matter against the background of legal precepts bearing on the problem. If when so viewed, reasonable minds could make findings that would make out a cause of action in accordance with the plaintiff's claims, summary judgment should not be granted; on the other hand, if it appears to the court that reasonable minds could not make findings which would establish a cause of action for the plaintiff, then the summary judgment is proper." (Footnotes deleted.)

The concurrence continued:

"In the event of trial, the burden will be upon the plaintiffs to prevail by a preponderance, or greater weight of the evidence. This cannot be done upon circumstances which are equally reconcilable with right as with wrong conduct." (Citing *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P.2d 986 (1954).)

In *Alvarado*, this court held:

"The burden was upon the plaintiff . . . ; such a finding of fact could not be based on mere speculation or conjecture, but only on a preponderance of the evidence. This means the greater weight of the evidence, or as is sometimes stated, such degree of proof that the greater probability of truth lies therein. A choice of probabilities does not meet this requirement. It creates only a basis for conjecture on which a verdict of the jury cannot stand." (Footnotes deleted.)

CONCLUSION

On the basis of the foregoing, it is manifest that judgment appealed from should be affirmed if the facts of record, correctly reflected in respondent's unabridged statement thereof, preclude recovery by appellants. It also is evident that reversal would be improper if based upon the existence of issues of law or disputed pleadings. In the analysis of undisputed facts, conjectural or speculative inferences—at odds with reasonable probabilities or embracing a presumption of rascality—should not be afforded effect.

Respectfully submitted,

FABIAN & CLENDENIN
Albert J. Colton
Kent Shearer

APPENDIX A

IN THE DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

CONTINENTAL BANK & TRUST
COMPANY, a State Banking Corpo-
ration,

Plaintiff,

vs.

CHARLES CUNNINGHAM and
WINFORD BUNCE,

Defendants.

} Case No.
119214

ANSWER TO REQUEST FOR ADMISSIONS

Comes now the defendants, Charles Cuningham and Winford Bunce, through their attorneys of record, Maxwell Bentley and Harry E. Snow, and in response to the plaintiff's Request for Admissions, gives the following answers:

1. Admits that Exhibits A, B, C, and D attached to the plaintiff's Request for Admissions are true and correct copies of the instruments referred to in said Requests for Admissions.
2. Admits Paragraph 5 of plaintiff's Request for Admissions.

Dated this 20th day of July, 1959.

/s/ MAXWELL BENTLEY
Maxwell Bentley
Attorney for Defendants
351 South State Street
Salt Lake City, Utah

Mailed a copy of the foregoing Answers to Request for Admissions to the plaintiff by mailing a copy of the same to plaintiff's attorney, Albert J. Colton and Kent Shearer, of the firm of Fabian, Clendenin, Mabey, Billings & Stoddard, 800 Continental Bank Building, Salt Lake City, Utah, this 20th day of July, 1959.

/s/ Maxwell Bentley